

EXHIBIT 15

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:
NATIONAL PRESCRIPTION
OPIATE LITIGATION

Case No. 1:17-md-2804
Cleveland, Ohio

Friday, September 28, 2018
3:40 p.m.

TRANSCRIPT OF HEARING ON MANUFACTURERS' MOTION TO COMPEL
BEFORE SPECIAL MASTER DAVID ROSENBLUM COHEN

APPEARANCES:

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(Appearances continued to Page 2.)

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United States District Court
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216-357-7092

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produced by computer-aided transcription.

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1 AFTERNOON SESSION, FRIDAY, SEPTEMBER 28, 2018 3:40 P.M.

2 SPECIAL MASTER COHEN: Thank you everybody for
3 coming here. I appreciate all the people here in the room
4 being here to inform me and educate me on a difficult
5 complicated issue. And thank you also for coming at short
6 notice. I'm gratified that everybody is here to help me
7 with this issue even though I issued an invitation only
8 three days ago.

9 It's my understanding that you have agreed to a format
10 through which you're going to try and talk me through the
11 issues that have to do with discovery from plaintiffs of
12 prescription-related information. Am I right about that?

13 MS. SINGER: Yes.

14 SPECIAL MASTER COHEN: And who's going to
15 start? Donna?

16 MS. WELCH: Yes. Do you want me to move to
17 the podium?

18 SPECIAL MASTER COHEN: Wherever you are more
19 comfortable doing it, but it makes sense to have a
20 microphone in front of you. Whichever place you're more
21 comfortable is fine.

22 MS. WELCH: So thank you --

23 SPECIAL MASTER COHEN: Let me just add one
24 thing I just remembered. So I sent out an e-mail, I think
25 it was early this morning or late last night, saying that I

1 had planned to spend a bunch of time to educate myself by
2 re-reading everything you submitted, but then the Kavanaugh
3 confirmation hearing was on TV, and so that was a little bit
4 of a distraction; but I did spend much of today re-reading
5 the letters that you sent, so I think I am up on the curve a
6 little bit.

7 And so I just want to make sure that everyone
8 understands that this is going to be a bit of a colloquy,
9 that I will interrupt and ask questions, and some of what
10 you are going to say I hope I already know. So I'm just
11 letting you know the state of where my head is at.

12 MS. WELCH: Very good.

13 MS. SINGER: And David, just to help guide the
14 argument, I think there are going to be 30 minutes on
15 defendants' side all in, 30 minutes on our side -- we'll try
16 to keep everybody honest -- and then a five to ten-minute
17 rebuttal by defendants.

18 SPECIAL MASTER COHEN: Thank you.

19 MS. WELCH: So thank you for agreeing to
20 hearing this in person, we appreciate it as well.

21 This is a key discovery issue from the defendants'
22 perspective. It's discovery that we believe, as you know,
23 goes to the heart of not only the claims, but our defenses
24 in the case, where plaintiffs among other things allege
25 fraud against the manufacturer defendants.

1 And as a shorthand, we've talked about this at a high
2 level as the motion to compel prescription-level data.
3 Specifically, we are talking about responses to three
4 discrete interrogatories. And we are seeking identification
5 of which prescriptions plaintiffs claim, first, were written
6 in reliance on a defendant's misrepresentation or
7 wrongdoing. That's interrogatory number 6. Second, which
8 prescriptions were medically not appropriate, interrogatory
9 number 10. And which prescriptions led someone in the
10 community in the Track One jurisdictions to become addicted,
11 thus causing the alleged damage in the community or the
12 harm, that's interrogatory number 7.

13 In addition, we've sought to compel production of
14 documents in response to requests for production 10, but I
15 think the argument here really centers around the three core
16 interrogatories.

17 As you know, and as is laid out in the papers, we've
18 been seeking the discovery since the outset. With respect
19 to the interrogatories, plaintiffs in the Track One cases
20 have now supplemented their responses twice, but they have
21 still failed to identify even a single prescription that
22 they claim was medically improper or written in reliance on
23 a misrepresentation by one of our clients.

24 For example, Cuyahoga in their supplemental response,
25 their final one in August, identified a number of categories

1 of documents from which they say we can go out and figure
2 out this information ourselves.

3 SPECIAL MASTER COHEN: Documents which they
4 produced, right?

5 MS. WELCH: Yes, documents they say they
6 produced, some categories where they say production is
7 ongoing. Among those they've identified 4,300 overdose
8 deaths from 2006 to 2017, but they haven't told us of those
9 which were even an overdose death from someone who had been
10 prescribed an opioid, let alone prescribed an opioid that
11 was manufactured by one of our clients; let alone took an
12 opioid and was prescribed an opioid by a doctor to whom a
13 misrepresentation had been made, or a prescription was in
14 their belief not medically proper; and thus we sought relief
15 from you on August 4th.

16 And I want to be clear, that while we believe there's
17 an issue here that is broader that relates to plaintiffs'
18 burden of proof and what we think they'll ultimately need to
19 do to prove their claims, that's not what we're here about
20 today. We are here on a discovery issue, and it relates to
21 whether we are entitled as defendants in this case to
22 responses to those interrogatories now while fact discovery
23 is ongoing.

24 We believe there are two central questions that you
25 need to answer in order to make a decision on that issue,

1 and the first is obviously is this information relevant, and
2 second, is it proportional to the needs of the case.

3 With respect to relevance, candidly, we don't think
4 there's a lot to say here. They concede in their responsive
5 letter brief that this is relevant to our defenses and that
6 we're free to mount the defenses we choose. They've never
7 contended this information isn't relevant to the defenses
8 here.

9 And to be clear, for each of the manufacturers, the
10 defenses include, for example, that our client didn't make
11 any misrepresentations to a doctor writing prescriptions in
12 the Track One jurisdictions.

13 Our defenses include that in writing prescriptions for
14 our clients' opioids no doctor in the Ohio Track One
15 jurisdictions relied on any misrepresentation. They include
16 that the prescriptions written for the opioids marketed and
17 sold by our clients were not medically inappropriate, that
18 the addiction-related harm in the communities that these
19 plaintiffs are seeking as damages was not caused by
20 prescriptions written for our clients' opioids, but rather
21 by something else, and that the majority of harm alleged by
22 the cities and counties is not a result of prescription
23 opioids at all.

24 We believe that both CMO-1 and your prior discovery
25 rulings specifically contemplated that we'd be given the

1 ability to get this very type of critical information to
2 support our defenses during fact discovery, and plaintiffs
3 essentially claim they don't seek damages for personal harm,
4 and therefore they should be allowed not to respond. They
5 should be able to avoid this relevant discovery because
6 they're not seeking personal harm for any individual.

7 Candidly, we believe that misses the point. They are
8 seeking harm for prescription-level harm. They are seeking
9 harm for what resulted from a prescription being written to
10 an individual, not to the harm that that individual may have
11 suffered him or herself, but to a slightly more attenuated
12 harm felt in the community. But it is not aggregate harm
13 that is not tied to prescriptions, it is harm from a
14 prescription written to a person who either overdosed or a
15 prescription written to a person who became addicted, and
16 thus took services or took other services from the community
17 that they wouldn't have taken. But it all at the end of the
18 day boils down to the question of whether the prescription
19 at issue, proper or not, was the prescription at issue
20 written based on a misrepresentation.

21 SPECIAL MASTER COHEN: So let me ask you two
22 questions. You listed a number of defenses that defendants
23 would seek to interpose that have to do with, you know,
24 particular prescriptions. To what extent are those fraud
25 based? In other words, the defenses that you named and in

1 your letters have made reference to the fraud claims.

2 MS. WELCH: They relate to the fraud claims,
3 they also relate to the other claims in the case, including
4 nuisance. At the end of the day, we are entitled to
5 understand what the alleged nuisance is and we're entitled
6 to understand which if any prescriptions written of our
7 clients' opioids prescribed by a doctor inappropriately
8 contributed to the nuisance.

9 SPECIAL MASTER COHEN: So their theory seems
10 to be, the plaintiffs' essential claim seems to be, you
11 know, they say every prescription, every prescription that
12 was written for an opioid was tainted. Every prescription
13 was tainted because of the marketing activity of the
14 defendants as a whole gave the wrong message to doctors in
15 the medical community.

16 So for example, that a prescription that might have
17 otherwise been legitimate was tainted because -- and again,
18 this is an example -- it should have been written for three
19 days and not 30, and the message to the medical community
20 was you can write as many days as you want without fear of
21 addiction except for extreme cases.

22 So for them to say in response to what you're
23 demanding, every prescription, every prescription was
24 tainted, I get that that doesn't address every single one of
25 the points that you made, but does that at least address

1 some of them so that now we're looking at a smaller subset.

2 For example, just a subset of prescriptions that led
3 to somebody's death in Cuyahoga County because of having
4 used an opioid, and not somebody who, for example, is only a
5 heroin user and never had a prescription opioid.

6 Do you follow that question?

7 MS. WELCH: I think I do, and I think it's an
8 important question.

9 Let me start by saying I think we wish we knew what
10 they meant when they said every prescription is tainted.
11 From a liability standpoint, our clients cannot be liable
12 for manufacturing and lawfully selling FDA-approved
13 products. And I think even the lawyers on that side of the
14 room would agree that not every prescription written in the
15 Track One jurisdictions for an opioid was tainted or wrong,
16 or shouldn't have been written in some fashion.

17 There are prescriptions out there that everyone should
18 be able to agree were fine, were medically appropriate, were
19 written for a person who needed them by a doctor exercising
20 their judgment that was not relying on misinformation or
21 misrepresentations, and we're entitled to know which ones
22 are and which ones aren't.

23 But I think you're right, and I think what your
24 question gets to is that there are two different ways to go
25 about doing what we're asking that you require them to do.

1 And I think there's been discussion and meet and confers
2 about the notion that this is an impossible task: You can't
3 expect us to look at 10 billion prescriptions or 10 million
4 prescriptions and tell you for each one was it medically
5 appropriate or not.

6 But what they can do is first look at the
7 prescriptions for which they've reimbursed, and I know
8 they're not seeking damages based on reimbursement, but
9 that's a universe of defined information that they know.
10 And they can tell us for those reimbursed prescriptions,
11 which ones do they think should not have been written.
12 That's something that's relevant potentially to liability,
13 to their claims, and to our defenses.

14 Telling us that they believe there's a taint or a
15 swirl around all of the prescriptions doesn't help us
16 defend, and we don't think gets them over the line, because
17 causation is an element of every single one of the claims.

18 So on the one hand, they can start with some smaller
19 universe. They did it in Chicago. In the Chicago case
20 where they were ordered to provide this information, they
21 didn't start with a billion prescriptions or a million
22 prescriptions written in the city of Chicago. They started
23 with the prescriptions that had been reimbursed, and they
24 looked at those, and they applied a construct, prescriptions
25 that had been written for over three months for

1 non-cancer-related reasons, and they came up with just over
2 250,000 claims. And from there --

3 SPECIAL MASTER COHEN: What database? More
4 importantly, what would the equivalent database be in the
5 Track One cases?

6 MS. WELCH: I believe here it's a combination
7 of the CMS-reimbursed claims database with an overlay of the
8 medical claims databases that give us the prescription
9 reason, the diagnosis code is I think what it's called in
10 many of these databases. And it's that universe of
11 information I think from which they can start.

12 And let's use the 250,000 claims as an example. They
13 whittled it down to there, but it was clear in Chicago that
14 plaintiffs didn't believe that all 250,000 prescriptions
15 written for over three months for non-cancer-related
16 reasons, they didn't contend that all of those were
17 improper. And they were ordered to identify which ones were
18 improper and to explain the basis.

19 SPECIAL MASTER COHEN: Wasn't that only
20 because they were seeking money damages in Chicago though?

21 MS. WELCH: I don't think the order was
22 because they were seeking money damages for reimbursement of
23 the claims. It was in the context of a case where one of
24 the things they were seeking was reimbursement for those
25 claims, but what they're telling you here is that even

though they are seeking even more attenuated damages, they shouldn't be required to identify the prescriptions that caused the harm.

So we think the rationale for why the Court ordered the identification of those prescriptions is equally relevant whether or not they're seeking reimbursement or not, and we think that the Court understood that when it issued CMO-1. The CMO-1 requirement likewise wasn't tied to whether or not they were seeking reimbursement. CMO-1 was tied to whether they were seeking damages relating to prescriptions that allegedly caused harm.

So we believe that it is clear that they can do it.
That's one way.

SPECIAL MASTER COHEN: So let me ask you a question. There are three different interrogatories, as you said. Whether they were written on reliance from messages given by the defendants, whether they were medically necessary or unnecessary, inappropriate, and whether they led to addiction, let's just take the last one for a moment.

The addiction question, it seems like you can come at it two different ways. The addiction question, you can look at all of those cases where the plaintiffs had to deal with addicts, right?

MS. WELCH: We agree.

SPECIAL MASTER COHEN: And then look at

1 whether those addicts in fact ever took an opioid product
2 manufactured or distributed by the defendants. So that's
3 coming at it kind of from the population backwards.

4 Written on reliance, you could look at all of the
5 scripts and basically say every single one, every single one
6 a doctor in some way relied on. In other words, it's just
7 that you might not like the answer, but it's a different
8 direction at coming at the answer.

9 What I'm trying to figure out is how you would ask
10 them to determine which ones are appropriate and which ones
11 were not, and whether that ties more to the question of
12 reliance or more to the question of addiction, if that makes
13 any sense.

14 MS. WELCH: I think I understand the question,
15 and I think with respect to which of the prescriptions were
16 medically inappropriate or medically proper, it's not a
17 question there of reliance on a misrepresentation. I think
18 that is a related but separate question.

19 SPECIAL MASTER COHEN: Agreed.

20 THE WITNESS: I think when you're talking
21 about medically appropriate or medically proper
22 prescriptions, there are criteria that one might use to
23 determine based on Mr. Reed's medical history whether the
24 prescription written for two months or three months of
25 opioids was appropriate given the medical circumstances.

1 We can't do that for them. The burden shifting, they
2 would seek under Rule 33(d) to say we'll give you all the
3 information, and you go sort it out if that's something that
4 you want to see, but we don't know what criteria they're
5 using. And again, the starting point in Chicago was three
6 months, prescriptions three months or longer for non-cancer;
7 but even of that population they seem to concede that not
8 all of them were medically improper.

9 And so the next exercise was for them to look at those
10 prescriptions, for them to look at the diagnosis code; why
11 was the prescription written, and to tell us if they contend
12 that it was a medically improper or medically inappropriate
13 prescription.

14 SPECIAL MASTER COHEN: Are you saying they did
15 do that in Chicago?

16 MS. WELCH: They were ordered to do that. We
17 believe that work was in process when the MDL was formed and
18 the case was transferred here.

19 SPECIAL MASTER COHEN: And then put on hold.

20 MS. WELCH: Correct.

21 SPECIAL MASTER COHEN: Go ahead.

22 MS. WELCH: Notably, the plaintiffs want to
23 position this case as a case where it's going to be
24 aggregate proof and so they don't need to do any of this and
25 we're not entitled to it, but they themselves have demanded

1 vast amounts of individualized discovery in this case.

2 They've demanded call notes and marketing communications,
3 and virtually every document that would suggest that there
4 was a communication to individual doctors. Why on earth
5 would that be necessary in a case of aggregate proof?

6 They've demanded detailed transactional data. They
7 haven't limited their requests for marketing materials to
8 aggregate materials or materials that are sufficient to show
9 what the messages were. They've wanted transaction and
10 communication-level data that's highly individualized.

11 And they can't have their cake and eat it too. They
12 can't say on one hand they're entitled to 20 years of
13 individualized discovery, and we get none because of their
14 theory of the case.

15 They also seek to avoid doing it now. And on the one
16 hand, they may suggest to you that this is impossible. I
17 think the two ways that you've discussed and that we've
18 tried to frame how they could go about doing this shows it's
19 possible. And there's not an affidavit in the record
20 suggesting that it's not possible or even suggesting the
21 burden. There's nothing in the record before the Court
22 substantiating burden, let alone substantiating
23 impossibility.

24 So perhaps recognizing that ultimately they will need
25 to do this they try to avoid at least doing it now, saying

1 this is premature, these are contention interrogatories;
2 maybe at the end of fact discovery, maybe in expert
3 discovery. That's not enough, we need the information now.

4 SPECIAL MASTER COHEN: So your letters have
5 said -- by the way, were you reserving five or ten minutes?

6 MS. WELCH: The discussion we had was 30
7 minutes for principal arguments --

8 SPECIAL MASTER COHEN: Okay.

9 MS. WELCH: -- and five to ten minutes for
10 rebuttal.

11 SPECIAL MASTER COHEN: That's fine.

12 MR. BRADY: I was going to try to stop in two
13 or three minutes to let the pharmacies --

14 SPECIAL MASTER COHEN: Well, as Kavanaugh did,
15 I'll take two of them to ask or answer a question.

16 So your letters suggest -- and I think you wrote this,
17 and I don't remember who else might have -- things along the
18 lines of "or at least they should say so in the
19 interrogatory." At least they should say we can't produce
20 this, we can't do this. Okay?

21 So what if their response -- and I think it might be
22 this -- is, look, we're not coming at the case this way.
23 We're going to try and prove our case using aggregate proof,
24 which perhaps the Court might not let them. Maybe it's a
25 summary judgment or a *Daubert* issue and the case goes away;

1 but let's not get to that, we're not there yet.

2 They say we are going to commit to not using
3 individual scripts to prove our case, we are going to commit
4 to aggregate proof, and experts testifying about multiple
5 regression analysis, and so on and so forth, to prove our
6 case, as they did in other cases like Neurontin.

7 And if the ruling is, okay, fine, if that's how you
8 contend you're going to pursue your case, then you can't use
9 any individual prescription analysis, you can't point to
10 any. You have to say so in an interrogatory. You have to
11 commit in writing that you're not seeking damages based on
12 individual prescriptions. And if it comes to trial and you
13 want to rely on any of that, you are not going to be allowed
14 to.

15 Okay. Why isn't that enough?

16 MS. WELCH: Well, first, even in Neurontin,
17 which is the case that they rely on --

18 SPECIAL MASTER COHEN: I disagree with
19 your -- I saw what you said, and I don't think that's right.
20 I don't think that -- I should put it this way. I haven't
21 read the whole case, but the quotation that you gave me that
22 talks about individual proof, I don't think that there was
23 individual proof. I think that it was a statement that
24 there wasn't. I'd have to go back and read it; I admit I
25 haven't done that.

1 MR. CHEFFO: I was one of the lead lawyers --

2 SPECIAL MASTER COHEN: You were there?

3 MR. CHEFFO: -- in the Neurontin case, yes.

4 So there was individual proof. In fact, there was

5 depositions of doctors that were used and shown.

6 SPECIAL MASTER COHEN: To whom by whom?

7 MR. CHEFFO: During the course of the

8 discovery there was transcripts and depositions of doctors.

9 The case involved Kaiser at the time, but doctors who
10 prescribed.

11 SPECIAL MASTER COHEN: All right. So would
12 you agree though that, again, I didn't read it, I was just
13 given two or three lines from what I'm sure was a much more
14 complicated opinion, but the essence of that opinion seemed
15 to be the Court spurning of that level of proof, that kind
16 of proof to get anywhere.

17 MR. CHEFFO: Well, there was a few things. I
18 don't want to take up too much time, but I think -- and we
19 can address Neurontin separately.

20 I think Neurontin was very different for a number of
21 reasons. First of all, the case was all about off label
22 marketing and promotion, and the theory was if it was used
23 for and prescribed for certain disease end points that were
24 not approved, then their claim was essentially that they
25 were snake oil.

1 So then their methodology was to basically say if it
2 was approved, if it was used for this type of disease and
3 ICD 9 code, that therefore we think it was categorically
4 improper.

5 Here it's approved for chronic pain, which is
6 drastically different. You're right, this is also a *Daubert*
7 issue, but there clearly was a lot of discovery in the case
8 that went on. No one suggested that you couldn't raise
9 these individual issues.

10 We ultimately in that Court -- and I think, you know,
11 again, it is a case, it's there, we think it's
12 distinguishable. It's frankly an anomaly and an outlier in
13 all the other cases, and I think the difference there, as I
14 said, was that Neurontin, gabapentin, the underlying
15 medicine, was an antiepileptic drug that was approved for
16 epilepsy and post-herpetic neuralgia, which is the disease
17 -- or the pain from after you get herpes, and it was widely
18 prescribed.

19 The claim was it was all as a result of off-label
20 marketing and promotion and it shouldn't have, but it was
21 very, very different than a medicine that's been approved
22 for many, many years for pain, and the claim here is that
23 you shouldn't, it didn't work for pain. So it's a
24 completely different situation, I think, but we can brief
25 that if you'd like.

1 Can I add two quick things? And we may want to turn
2 it over.

3 SPECIAL MASTER COHEN: Ask Donna, not me.

4 MR. CHEFFO: Do you mind, Donna?

5 MS. WELCH: No, go ahead.

6 MR. CHEFFO: Just really two points. One was
7 I think it's not correct, frankly, to say, you know, they
8 may argue, they may say that it's impossible or they can't
9 do it. In fact, and again, there's nothing in the record
10 where they know how to find affidavits, and they haven't
11 said that this is the time, we've kind of been through this
12 before. There is no affidavit that says this is impossible.

13 In fact, we have given you evidence that it is
14 possible. If you read the transcript from the Summit County
15 Medical Examiner, they said that there's 213 deaths,
16 overdose deaths in Summit County in 2015. We regularly look
17 at the medical records, we look at the PDMP, OOARS as I
18 think it is called here, and we actually do this analysis,
19 and we have the right to get medical records.

20 So in fact, everything in the record says just the
21 opposite, that it is possible. So it would not be right --

22 SPECIAL MASTER COHEN: That's the led to
23 addiction question.

24 MR. CHEFFO: And the other point was I think
25 you said with respect to can they just say, you know,

1 everything, can they just say it all. Right? I think that
2 was the first point. And I would just address that briefly
3 by saying this: Maybe in a complaint you can do that, I
4 suppose, and just say we think everything was tainted, but I
5 don't think -- and you know, again, they haven't done it,
6 but I don't think they could say under Rule 11 or verified
7 interrogatory response that we think every prescription that
8 was written is somehow improper, without talking to any
9 doctors, without looking at the prescriptions, without
10 talking to the patients to find out if they actually
11 benefited from these medicines.

12 Think about it. Patients continue to take a pain
13 medication for years and years and years because it didn't
14 work? And they didn't know it? And they somehow didn't
15 work? Doctors continued to prescribe it for years and years
16 and years to patients in chronic pain, and it didn't work?

17 So I don't know how you can make the allegation under
18 essentially the rules that would apply and say we think
19 every prescription written in Cleveland, Cuyahoga, Summit,
20 or Akron, was somehow improper, and we're just going to wave
21 our hand over it without actually doing the type of work
22 that we're talking about, which is actually defining the
23 narrow universe.

24 The last thing I'll say, David, what we're really
25 asking for is if we don't have this type of information it's

1 a needle in a haystack, because essentially what we then
2 have to say is here is this potential universe of thousands
3 or millions of claims. Maybe we think some of them we want
4 to hold you responsible for billions of dollars and all this
5 types of relief, injunctive relief, but we'll tell you
6 later, or maybe we won't know, or maybe when you get our
7 expert report.

8 That's not the way it's supposed to work. You've
9 asked us to produce tens of millions of pages of documents
10 and information. We basically said you've made a claim that
11 many people were injured, that many people were harmed, that
12 there were these prescriptions that led to bad things.

13 I think it's a plain vanilla kind of argument we are
14 making, which is show us those prescriptions. We shouldn't
15 be required to look at every prescription ever written and
16 try and divine which ones might be at issue here.

17 SPECIAL MASTER COHEN: 30 seconds to wrap?

18 MS. WELCH: Yes. I'll wrap up by saying it's
19 not sufficient for them to just say we can't do it or we
20 shouldn't have to do it. It's clearly relevant to Mark's
21 point. We have produced millions of pages, and the
22 discovery rulings that are relevant to the defendants set
23 the frame for proportionality here.

24 SPECIAL MASTER COHEN: I agree. I agree.

25 I see some folks in the back row kind of looking at

1 each other like maybe they want a turn, and I don't know
2 what the agreement is, so I'm looking to you to tell me.

3 MR. DELINSKY: David, if it's appropriate.

4 MS. SINGER: Two minutes.

5 MS. WINNER: I think we have three.

6 SPECIAL MASTER COHEN: I'll let you have four.

7 MS. WINNER: Thank you.

8 MR. DELINSKY: Thank you, Special Master.

9 Eric Delinsky on behalf of CVS. I'm speaking on behalf of
10 the other major pharmacy defendants, as well; Rite Aid,
11 Walgreens, Walmart.

12 Special Master, we have comparable interrogatories and
13 we join in the manufacturers' arguments. All
14 interrogatories are different. We have two of them, they're
15 set forth in the two letters we've provided to you on the
16 subject. I won't get into them unless it would be helpful
17 to you.

18 But suffice it to say, our two interrogatories are
19 very tethered to plaintiffs' claims. In other words, they
20 seek the prescriptions, the filling of which plaintiffs
21 contend caused them harm, and for which they seek recovery.
22 They're narrow in that fashion.

23 The reason why I requested a few minutes to speak is
24 simply to explain how this category of discoverable
25 information pertains to the pharmacy defendants, and frankly

1 to our distributor defendants as well, because it's
2 different than as to how it pertains to the manufacturer
3 defendants.

4 The pharmacy defendants and the distributor defendants
5 aren't claimed, aren't alleged to have engaged in a fraud.
6 Those aren't the claims against us. Thus there's no room
7 for a claim by plaintiffs that all prescriptions that
8 involved any of us are somehow tainted.

9 Cases like Neurontin and cases like ConAgra, all of
10 which involved sales and promotional activity, do not
11 pertain to the claims against the pharmacies and other
12 distributors. The claims against us are based on the idea
13 that we shipped orders of prescription opioids to pharmacies
14 that were allegedly suspicious, and that we therefore should
15 not have released from the warehouse. Even as pharmacies
16 that's the allegation against us because, as you know,
17 Special Master Cohen, we are sued in our capacity as
18 distributors. The allegation is not that all of the
19 shipments were improper, it's that some slice of them were
20 suspicious and shouldn't have been shipped.

21 For plaintiffs to make their claim, the next step is
22 they then have to show that pills or controlled substances
23 from these suspicious orders caused them harm, and the link
24 to that claim are the prescriptions that were filled. In
25 other words, the prescriptions that were illegitimate in

1 nature, that pills from these allegedly suspicious orders
2 were used to fill. Those prescriptions are the link,
3 Special Master Cohen, between the conduct alleged against
4 us, the suspicious orders that we allegedly shipped, and
5 plaintiffs' harm.

6 In the pharmacies' interrogatories --

7 SPECIAL MASTER COHEN: Let me ask you a
8 question. If the plaintiffs can identify for you the
9 suspicious orders alone -- just those, right, which
10 presumably they would do using ARCOS data or some other
11 mechanism; but they come back and give you a spreadsheet,
12 here are all the orders that are suspicious -- why do you
13 then need any additional link of which pill from which
14 prescription caused harm?

15 MR. DELINSKY: That's a good question, and the
16 answer is as follows: An order can be deemed suspicious,
17 we're talking about the wholesale level, so an order can be
18 suspicious due to its wholesale size, its frequency, and
19 other characteristics about it, none of which have anything
20 to do about how those pills ultimately are used.

21 So in theory and as a practical matter, this is most
22 often how it very well turns out, a suspicious order can be
23 shipped from a wholesaler to a pharmacy and result in no
24 ground level diversion at all. Every single pill in a
25 suspicious order could be used to fulfill a perfectly

1 legitimate prescription, and the order is simply deemed
2 suspicious because from a wholesale perspective it was too
3 large.

4 So that's why identification of the suspicious orders
5 or the alleged suspicious orders themselves are not enough.
6 It doesn't provide us any information about the core theory
7 is that the drugs in the suspicious orders then were
8 diverted, and diverted in a way that caused the counties or
9 the cities harm.

10 SPECIAL MASTER COHEN: So I think your time is
11 up. Thank you for that. When we come back to you, another
12 thing that we haven't touched on but is clearly on the
13 horizon are the 30(b)(6) topics. And one of the things that
14 I would ask you if we had two more hours to go into is to
15 what extent can the information that you're seeking be
16 sufficiently answered in writing. So remember to address
17 that when we come back to it, and if you would address that
18 to some extent, Linda, during your presentation, that would
19 help me.

20 MS. SINGER: All right. I am just going to
21 stand here.

22 So first of all, actually I think there are three
23 basic issues that are raised by defendants' interrogatories.
24 And by defendants, I am principally referring to the
25 manufacturer defendants.

1 The first is that we don't have a list, the CT-1
2 bellwethers do not have a list of medically unnecessary
3 prescriptions to produce to defendants, and we cannot
4 produce what we don't have. That's first.

5 Second, we have provided, however, the underlying data
6 to the extent that we have it, and I'll describe what that
7 is, and a host of individualized information from which
8 defendants can draw their own conclusions. And under
9 Federal Rule of Civil Procedure which defendants have not
10 addressed, that is sufficient to identify the business
11 records.

12 And third, you know, this idea of medically
13 unnecessary prescriptions is really a creature of
14 defendants' making in this case. You will never find it in
15 any of the CT-1 bellwether cases, it is not how we intend to
16 prove our claim. It is different than the city of Chicago
17 case.

18 And I'll stop there for one minute since you asked
19 about it, and I know Miss Welch spoke about it for some
20 time. In that case there were false claims allegations, and
21 those false claims allegations turned on whether the claim
22 was false because it caused doctors to submit and certify
23 and the city to pay prescriptions that couldn't be covered
24 by their plan which required that they be medically
25 necessary or appropriate. That's not the claim here. The

1 cities and counties have specifically disclaimed seeking
2 reimbursement for those claims. So those are the three core
3 issues that I'm going to speak to.

4 One other thing I just wanted to note, you addressed
5 some of these issues when they came up in the context of
6 RMPs in discovery ruling 1, and so we're not coming to this
7 issue on a blank slate, though a discovery ruling six weeks
8 or two months ago feels like dog years in this case. But
9 you know, there defendants were seeking medical records,
10 insurance records, pharmacy records for any individual we
11 claimed was harmed; documents related to any patient who
12 received, obtained, or were harmed by improper or medically
13 unnecessary prescription and claims data.

14 And there you made the same analogy I think you drew
15 from your questions today, which was that we can't conflate
16 discovery with sufficiency of proof. And I think many of
17 the arguments defendants are making relate to the fact that
18 they think a case proved by aggregate proof is insufficient,
19 but that doesn't go to the core discovery issues.

20 SPECIAL MASTER COHEN: Well, they clearly
21 think it's insufficient, but they interpose a different
22 issue, which is that regardless of which way you choose
23 proving your case, they're allowed to defend it the way they
24 want to, and the information they're asking for is highly
25 relevant to their defense.

1 MS. SINGER: And I will get to that. I think
2 the short answer to that, which I'll come back to, is first
3 of all, we've produced lots of claims data for defendants to
4 provide their own analysis of; and two, we have provided
5 265,000 documents with individualized proof information in
6 it. And I will talk about what some of that is. So it is
7 not the defendants don't have information, what they don't
8 have is our identification of prescriptions according to
9 their theory of defense.

10 SPECIAL MASTER COHEN: Well, would you even be
11 willing to say, okay, here are all the 265,000 documents
12 that reflect, for example, whether -- I'm not sure what they
13 reflect, but I assume for example that they would reflect
14 that a given patient was prescribed opioids and had some
15 sort of bad outcome.

16 MS. SINGER: So I thought it might be helpful
17 to talk about this a little more concretely, so I will jump
18 ahead. I'm sorry, I only have one copy.

19 MS. WINNER: Do you have a copy for us?

20 MS. SINGER: I only have one.

21 MS. WINNER: Can you tell us what it is?

22 MS. SINGER: Yes, I'm going to talk about it.

23 SPECIAL MASTER COHEN: Is this in the
24 record --

25 MS. WELCH: Well, this was not provided in

1 advance.

2 MS. SINGER: I'm going to go through it.

3 MS. WINNER: The top summary isn't Bates
4 stamped. Is this a produced document? Because some of the
5 remainder appears to be hearsay --

6 MS. SINGER: I promise that I will explain
7 what's here.

8 So what's here is a summary that was created by
9 counsel of some of the individualized proof that has been
10 provided in the case with Bates numbers to give you a sense
11 of the kind of information that is had, and then examples
12 with Bates numbers from defendants' produced documents.

13 And I raise this only to your point about the kind of
14 information that defendants have available to them. And let
15 me come back to that later. I did have one other thing that
16 I wanted to submit.

17 MS. WELCH: Special Master, we object to the
18 introduction of this evidence here at the hearing. It's
19 lawyer-created, it wasn't provided in advance, and we've had
20 no opportunity to go back and look at what this information
21 is and how it would be used.

22 MR. CHEFFO: This has been pending for months
23 and months. I think you know that, David. Obviously it'll
24 be decided at the time of jury trial, but this is highly
25 improper to basically spring this on us in the middle of the

1 hearing when you haven't seen it, and we don't even know
2 what it is.

3 MS. SINGER: I could not agree with that
4 more -- to get back to the microphone. You know, we
5 received letters this week that defendants have come here to
6 argue about that we haven't even responded to.

7 MR. CHEFFO: That's not true.

8 SPECIAL MASTER COHEN: We're getting off
9 topic. So I don't need to see these.

10 To go back to my original question. Okay? So I
11 assume that in here are autopsy reports, are medical records
12 of the decedent, are prescription records of the decedent,
13 but that seems to be insufficient for them to do what you
14 say they can do. It seems like they would also need at
15 least this: There are the records, you can do it as well as
16 we can, but our conclusion is that anyone who was
17 prescribed -- perhaps this is what you think -- our
18 conclusion is that anyone who was prescribed an opiate
19 product that you manufactured or distributed and ended up
20 dying is someone who falls within the category of someone
21 who was responsive to your interrogatory, that is they
22 received medically inappropriate treatment. Is that --

23 MS. SINGER: So again, with you for almost all
24 of that except the concept of medical necessity, which is
25 not again an element of our proof or claims here.

1 SPECIAL MASTER COHEN: Okay, so let's take off
2 the last little bit. My question is, you haven't given that
3 description. You haven't said what I just said in an
4 interrogatory response.

5 MS. SINGER: That we contend that all -- I'm
6 sorry, say it again, David.

7 SPECIAL MASTER COHEN: You know, I'm not
8 suggesting what answer you should give, but one of them
9 could be --

10 MS. SINGER: A description of the types of
11 conduct and prescriptions and injuries that we consider
12 covered by our complaint. I think our complaint lays that
13 out, and we can certainly respond to an interrogatory to say
14 that. I think we have said that repeatedly in
15 correspondence with defendants.

16 I understand that interrogatory responses are
17 different --

18 SPECIAL MASTER COHEN: Yes.

19 MS. SINGER: -- but I think here the core
20 issue that defendants have been talking about is not a
21 description of a class of conduct and claims, but specific
22 identification of prescriptions, providers, pharmacies,
23 patients. And that's what we don't have. And I think it
24 might be helpful to think about their request in two
25 categories. One is data we don't have, information we don't

1 have.

2 SPECIAL MASTER COHEN: And that you could say
3 in an interrogatory we do not have, correct?

4 MS. SINGER: That's right. And I think again
5 we have said that in our objections and responses.

6 SPECIAL MASTER COHEN: Okay.

7 MS. SINGER: Two is underlying business
8 records, claims data, autopsy records, medical reports,
9 addiction treatment records to the extent that they can be
10 produced under federal law, EMS runs, police records, court
11 files; all of which very specifically cover individual X,
12 typically named, picked up on this corner with prescriptions
13 of opioids bearing CVS pharmacy dispensing.

14 SPECIAL MASTER COHEN: Some of them do, but I
15 presume some don't.

16 MS. SINGER: That's true.

17 SPECIAL MASTER COHEN: You know, there are,
18 I'm sure, without having gone through any of the data, that
19 there are folks who overdosed on heroin and never took an
20 opioid prescribed, manufactured, or distributed by the
21 defendants. Right?

22 MS. SINGER: Of course.

23 SPECIAL MASTER COHEN: And would you claim, do
24 you claim -- that's kind of part of their question -- that
25 the cost that stems from that particular event is something

1 they should pay for because it's part of the nuisance, for
2 example?

3 MS. SINGER: So the complaint alleges, and I
4 think the scientific evidence on this is clear, that roughly
5 75 to 80 percent of people who use heroin first started with
6 a prescription opioid. And you know, I think this is one of
7 the difficulties of mapping defendants' arguments to ours.

8 When defendants marketed their opioids, first of all,
9 a lot of it was unbranded, right? It wasn't specific to a
10 particular product. As you pointed out, a lot of the impact
11 of their marketing, it may have been Janssen that was doing
12 the marketing or Teva, but could have led to a generic or a
13 Purdue prescription that may have caused the physician or
14 the patient to stay on the drug longer or go to higher
15 doses, both of which are far more dangerous. That becomes
16 the real difficulty of teasing that out from the data.

17 What we do allege is that the defendants engaged in
18 pervasive marketing campaign. It touched virtually every
19 source of information. Defendants did it because it worked,
20 they watched it work, and in their internal documents is
21 lots of information where they talk about increased
22 prescribing and the impact that their marketing is having.

23 You know -- and I think the example that Miss Welch
24 gave is an instructive one, call notes. You know, we've
25 asked for individualized proof. We should be expected to

1 produce it ourselves.

2 Defendants maintained call notes in the course of
3 their business and they have produced them to us. We
4 haven't told them to go out and have their sales reps write
5 down everything they said to doctors and doctors they
6 visited, but where they've kept those records they're
7 responsible for producing them. That's exactly what we have
8 done here, and I think Federal Rule of Civil Procedure 33(d)
9 specifically says that where the response for an
10 interrogatory can be found in a business record then you're
11 entitled to direct the requesting party to those business
12 records. And we have done that at great length.

13 And one of the things we looked at prior to this
14 hearing, because after defendants raised these issues we
15 asked them some of the same questions, because they clearly
16 articulated that it is relevant to their own defense
17 strategy, and that, you know, we think they have information
18 that they are asserting we have.

19 So we asked them the same questions, and interesting
20 to look at how they responded to that, if I can find it. So
21 Allergan, Miss Welch's client, represented that it was a
22 contention interrogatory that was not ripe. Purdue promised
23 to produce IMS data, so the sales data that they buy, and
24 their abuse and diversion detection data, so that we could
25 assess that ourselves.

1 Janssen --

2 SPECIAL MASTER COHEN: I missed something.

3 These are responses to what?

4 MS. SINGER: Interrogatories that plaintiffs
5 served.

6 SPECIAL MASTER COHEN: Asking what?

7 MS. SINGER: Asking for prescription data.

8 So I think by defendants' own theory, their own
9 responses, they say they can't do it. They say it's
10 information in the hands of third parties, they're
11 contention interrogatories, and they're premature because
12 discovery is not done. And we don't even have, again, these
13 lists.

14 I also want to offer, because defendants have raised
15 as an argument that we have not built a factual record here,
16 and I just got this this afternoon, but it is a declaration
17 on the fact that --

18 MR. CHEFFO: We're going to object.

19 MS. SINGER: Can I finish speaking?

20 MR. CHEFFO: Usually people wait until there's
21 an objection heard before they give the evidence to the
22 Judge.

23 MS. SINGER: He hasn't looked at it.

24 MR. CHEFFO: So again, David, same rules.

25 MS. WINNER: Again, on behalf of the

1 distributor defendants, may I ask for a copy of this
2 declaration, please?

3 MR. CHEFFO: I think it's the same objection.
4 I can't even get through it to know what it is. There's not
5 even been a proffer. It is clearly highly unusual, if not
6 highly improper. We've been at this for a very long time.
7 The record is what it is, and if we allow this type of
8 conduct, this will never end.

9 You know, if counsel had something that was probative
10 or interesting or useful, they know where to find us. They
11 could have just sent this, and we could have evaluated it.
12 But to kind of spring it in the middle of hearing -- they
13 didn't even come to us before and say, oh, by the way, we
14 have this information, we'd like you to look at it. They
15 are just trying to spring it on us, and you, in the middle
16 of a hearing.

17 MS. SINGER: Again, defendants are making the
18 argument that we haven't provided a record. We're here at
19 the hearing. If defendants want to keep the record open --
20 but to say that we haven't identified a burden in compiling
21 information that we've produced to them --

22 SPECIAL MASTER COHEN: Let's talk about
23 burden. How would you characterize the burden that was
24 placed on the defendants in discovery production?

25 MS. SINGER: In what regard?

1 SPECIAL MASTER COHEN: What adjective would
2 you apply to characterize the discovery burden that I placed
3 on defendants?

4 MS. SINGER: This is a large complex case.
5 Defendants have produced significant number of documents.

6 SPECIAL MASTER COHEN: Tens of millions.
7 Would you say it was a heavy burden?

8 MS. SINGER: I think it is a burden that's
9 proportional to the complexity and significance of this
10 case. And I would also note that much of the production
11 that defendants have made in this case is of material that
12 was previously produced in other investigations of their
13 conduct, while plaintiffs have responded with I think for
14 Summit County and Akron close to 3 million pages of
15 documents, each of which have been gathered in the course of
16 this litigation for this litigation. So both parties have
17 engaged in significant discovery.

18 I think the inquiry that's relevant for FRC 33 is
19 where the answer to interrogatory can be found in the
20 business records of a party that the question is who bears
21 the burden of answering that question. And again, Federal
22 Rules say if the answer to an interrogatory may be
23 determined by examining, auditing, compiling, abstracting,
24 or summarizing a party's business records, and if the burden
25 of deriving or ascertaining the answer will be substantially

1 the same for either party, which is certainly the case here,
2 we don't have the answer in our records, we would have to do
3 exactly what defendants would have to do here.

4 SPECIAL MASTER COHEN: Well, even as to the
5 prescriptions, okay, so defendants have databases, they have
6 access to data, IMS, whatever it is, that identifies every
7 script written of opioids. Okay? They have that. And so
8 if we just look at that, they've got it, they can get it;
9 you've got similar data, you can get it. But you said 70
10 percent of those, 70 percent of heroin users started out
11 with -- I think that's what you said -- started out with an
12 opioid script; that they don't know.

13 MS. SINGER: So again, with many of these,
14 kinds of questions they are only knowable at an aggregate
15 level. Maybe one way to think about this, when defendants
16 set out to market opioids for chronic pain to dramatically
17 expand the market, they didn't know if you were going to end
18 up with a script or I was going to end up with a script.
19 They didn't know whether it would go to somebody with a
20 mental health history or a history of substance abuse, or
21 childhood trauma.

22 What they knew was that a significant portion of those
23 patients would become addicted. And to try to go back
24 person by person and figure out who that was, the fact is,
25 on an aggregate basis, on an epidemiological basis, we know

1 that 20 percent of the population is going to have those
2 characteristics because of the nature of this drug,
3 particularly when taken long term and at high dose. They're
4 going to become addicted, they're going to overdose, and
5 they're going to die, and that's just what happens.

6 And this building and parsing of this case
7 prescription by prescription is not how it works in the real
8 world because, again, it wasn't marketed to you, it wasn't
9 marketed to me.

10 SPECIAL MASTER COHEN: Do you think
11 that -- I'm going to jump way down the road, kind of a
12 theoretical hypothetical. Do you think the defendants
13 should be precluded as an evidentiary matter from bringing
14 in doctors and asking them if they relied on any of the
15 marketing messages that they sent out?

16 MS. SINGER: You know, not having that
17 question in front of us and just as an immediate reaction to
18 that, I think if defendants can identify doctors who they
19 want to bring in -- and again, they know who they visited,
20 they know who wrote prescriptions -- if they want to bring
21 them in to say that, sure. I think the fact-finder will
22 have to assess the probity and the relevance, the value of
23 that evidence. And that was I think one of the findings in
24 the Neurontin case.

25 SPECIAL MASTER COHEN: Right. But if they're

1 allowed to do it as a matter of a defense, which maybe is a
2 worthless defense, okay, I can imagine all the arguments you
3 would make as to why that is an irrelevant piece of evidence
4 in the case, but if they're allowed to do it, then can't
5 they discover the information necessary to find out who the
6 doctors were and which scripts were written, and which ones
7 you say are wrong and inappropriate, and whether they relied
8 on messages from the defendants?

9 MS. SINGER: I think three answers to that.
10 One is they're entitled to do it from the information they
11 have, and they have vast amounts of that information. They
12 were the ones out there doing that marketing.

13 Two is they can do it from the information that's in
14 the documents we produced to them, so we've produced
15 Cuyahoga, Cleveland, Summit, and Akron's claims data. We
16 have produced that to them.

17 There are limits on how they can use it, but they have
18 that information from us, and they can come back to you.
19 We'll argue against it, but they have information on those
20 doctors, and then they have these 265,000 documents just
21 from Summit alone that show autopsies that often identified
22 the prescribing doctor, that showed the individual, arrest
23 reports, court records, all of those places. Prosecutions
24 of doctors for running pill mills. There is lots of raw
25 information in that discovery that let's them build this

1 defense and.

2 I think, again, the core difference here is that
3 defendants are permitted to pursue their defense. They're
4 permitted to seek relevant evidence from us, and we're
5 producing that evidence in significant volumes, and we've
6 pointed them to that evidence.

7 What they can't do is require us to go out and create
8 that evidence so they have it in an organized fashion to do
9 that. Again, asking us to apply a medical necessity screen,
10 which is not something we used in that complaint, I don't
11 even know how we'd define medical necessity because we don't
12 use it. So how do we go about doing that?

13 And again, I want to come back to the FRCP 33(d)
14 argument, which I think is really at the center of this
15 question that we're grappling with. You know, the rule
16 directs that the responding party may specify the records
17 that must be reviewed in sufficient detail to enable the
18 interrogating party to locate and identify them as readily
19 as the responding party could.

20 The advisory committees from 1970 note the subdivision
21 gives the party an option to make the records available and
22 places the burden of research on the party who seeks the
23 information. Quote, this provision, without undermining the
24 liberal scope of interrogatory discovery, places the burden
25 of discovery on its potential benefitee.

1 SPECIAL MASTER COHEN: I know how 33(d) works,
2 and I've applied it before. And I am having trouble
3 understanding how -- it's a question of how -- it's an issue
4 of how the question is framed. They're framing a question
5 that is different than the question you want to answer, but
6 the questions that they're asking, for example, "led to
7 addiction," how are they supposed to take the records that
8 you have provided and figure out which scripts led to
9 addiction and which ones didn't?

10 MS. SINGER: Often the records will say.
11 Patient admitted with history of Opana use or prescription
12 opioid use, or oxycodone.

13 SPECIAL MASTER COHEN: So is it your position
14 that in every instance where --

15 MS. SINGER: No.

16 SPECIAL MASTER COHEN: Then how are they
17 supposed to know?

18 MS. SINGER: So I think where we have a clash
19 here is that, again, we have chosen to proceed on the basis
20 of aggregate proof because, again, that's how this marketing
21 and that's how the harm works in the real world. Defendants
22 want to offer a defense, and they're getting literally reams
23 of information from us to help them build that defense.
24 They will have a chance to challenge the sufficiency and the
25 methodology of our proof. They will have a chance to offer

1 their own evidence, doctors they want to bring in, patients
2 they want to bring in, addiction treatment experts, their
3 own regression analysis. They'll have lots of ways to prove
4 their defense.

5 And I note, one of the cases we cite in our letter to
6 you is a case by the United States Department of Justice
7 against Life Care, a nursing home, and it played out in
8 exactly the same way in that case. It was a false claims
9 case, so a case where in any case the burden was on the
10 government to say these are the claims that are medically
11 unnecessary. And there the district court said in denying
12 defendants' motion to compel, defendant is not simply
13 requesting that the government disclose discovery. They're
14 essentially requesting that the Court impose the affirmative
15 burden on the government to identify each claim in the total
16 universe of claims which could be categorized as false.

17 It goes on to say, simply because the defendant may
18 choose among these options -- and it goes through all the
19 ones I just discussed -- to pursue a litigation strategy
20 that relies on a claim-by-claim review does not justify
21 placing the burden on the government to be the party that
22 performs that review.

23 They will have the claims data. They've also issued
24 subpoenas to the state Medicaid agency, state board of
25 health, the state addiction treatment agency. They've asked

1 for all of this information. They among their own records
2 have dispensing data, you know, all of that information, IMS
3 data. CVS has PBM data on treatment.

4 And we've provided them, by the way, not just with
5 prescription claims data, but medical claims records that
6 can be matched up. I mean, it is for our slice of the
7 universe that we see, which is a fraction of the population
8 of Cuyahoga and Summit, because the only claims data we have
9 is for the people who worked for the cities and counties.

10 Defendants actually through their own records have a
11 lot more information than we do, but we've provided what we
12 have.

13 SPECIAL MASTER COHEN: So let me ask you about
14 that. The claims data is data for county and city
15 employees, right?

16 MS. SINGER: That's right, and their
17 dependents.

18 SPECIAL MASTER COHEN: And it includes whether
19 they ever received a prescription for opioids --

20 MS. SINGER: That's right.

21 SPECIAL MASTER COHEN: -- and whether there
22 was any -- well, do any of the databases also reflect for
23 those people whether they ever had addiction issues?

24 MS. SINGER: It includes their medical
25 records, where the provider -- right -- typically the city

1 and county have different prescription vendors from medical
2 claims, but we've produced them both for the periods we have
3 those records.

4 SPECIAL MASTER COHEN: I guess I am trying to
5 figure out whether it's your position that every single one
6 of those prescriptions of opioids was part of the opioid
7 crisis.

8 MS. SINGER: Part of the opioid crisis: I
9 want to say back to you the way we would say it and the way
10 we have articulated it in the complaint, which is defendants
11 through their marketing and distributing of the opioids
12 caused an oversupply, an overuse of opioids in the cities
13 and counties, which caused an increase in all sorts of
14 public health and public safety issues that the cities and
15 counties had to pay for.

16 And so that happens, again, at an epidemiological
17 basis, and it is the difference between defendants saying we
18 have to prove every script and add them all up together, but
19 that's again not how the harm is created, because it's not
20 about whether you got the script or I got the script, but
21 that we knew that a percentage of the population was going
22 to get it, and we caused harm.

23 It is a sideshow of personal injury cases that are
24 very different standard of proof in those claims instead of
25 what these plaintiffs have asserted in this case.

1 And I guess the one other way I'd say it is that
2 defendants are entitled to their defense, and that is the
3 reason that we are producing all of the documents; the raw
4 data, the records of the sheriff, the police, the EMS runs,
5 the Narcan, courts, all of that stuff for them to go
6 through; but what they're not entitled to is to decide on
7 our offense what information we have to put together and
8 categorize in order for them to proceed with their defenses.
9 We can give them the raw data, we can give them the
10 documents. And just as we have to put our case together
11 from their documents and our investigation, they have to do
12 that themselves.

13 And so again, if we were asking defendants to create
14 records of what every sales rep said, or -- I guess that's
15 the best example that comes to me -- and they didn't have
16 them, we couldn't under 33(d) or Rule 26 proportionality
17 require them to create it. And that's what they're seeking
18 to have you require us to do, and there's no reason we
19 should bear the burden for their defense.

20 SPECIAL MASTER COHEN: If I disagree with you,
21 let's get to the topic of answering in writing in 30(b)(6)
22 topics. How do you address that?

23 MS. SINGER: Answer which question in writing?

24 SPECIAL MASTER COHEN: I'm not even sure.

25 There are a whole bunch of interrogatories that touch on

1 this.

2 MS. SINGER: So the interrogatory that asks
3 for us to identify medically necessary claims, again, I
4 don't know how we would do that when we don't apply a
5 medical necessity definition in our case.

6 SPECIAL MASTER COHEN: I said interrogatories,
7 I meant 30(b)(6) topics. There are a whole bunch of
8 30(b)(6) topics where they say, well, at least plaintiffs
9 can do it in writing.

10 MS. SINGER: I mean, to the extent that we
11 have created the information or someone who can answer the
12 questions as one would in a 30(b)(6), but we can't instruct
13 someone to answer medical necessity questions when it's not
14 information that the city or cities or counties keep in
15 their regular course and they don't have the expertise to
16 do.

17 And to the extent that any of these things are going
18 to get created, it's not going to be through city and county
19 employees, it's going to be through expert testimony.

20 SPECIAL MASTER COHEN: Okay. I think that's a
21 half an hour. Is anybody keeping track?

22 MS. SINGER: It felt longer.

23 SPECIAL MASTER COHEN: That's my job.

24 MS. BIERSTEIN: Actually I wanted to just say
25 about one-and-a-half minutes on pharmacies, but before I do

1 that I wanted to underscore something that Linda just said
2 which I think is maybe getting a little lost here, which is
3 that what Mark argued earlier was that the burden should be
4 on the plaintiffs to find this -- to identify the medically
5 unnecessary ones, because he said we don't know what you
6 mean by medically necessary.

7 And I think what Linda was saying, and I just want to
8 underscore it, is no, we don't know what you mean by
9 medically unnecessary because it's not our term. You can
10 word search the complaint, it's not there. And because it's
11 not our term, we don't know what they mean. And if we don't
12 know what they mean, it's not in terms of who would be more
13 appropriate to do it.

14 SPECIAL MASTER COHEN: Let's change the
15 phrasing then. What I think you do say in the complaint is
16 that there was an oversupply, that there were excess
17 prescriptions written, or at least excess pills prescribed.
18 So let's change it a little bit to say, okay, guys,
19 plaintiffs, identify those that are excess.

20 MS. BIERSTEIN: Well, I think -- and that is a
21 question that actually segues into I think what I was going
22 to talk about, which is the pharmacy questions, because
23 that's not a question manufacturers have asked, but it is a
24 question that pharmacies are asking.

25 They're asking us to define what the appropriate

1 number of pills into any jurisdiction would have been,
2 that's in one of the interrogatories. So I want to answer
3 it again quickly, because I don't want to push on the time
4 thing here. In the context --

5 MS. WINNER: Just to save time, this is Sonya
6 Winner for the distributors, I believe you're referring to
7 something that's not ripe, we've all agreed is not ripe. It
8 has been submitted.

9 SPECIAL MASTER COHEN: You objected to this.

10 MS. WINNER: Yes.

11 MS. BIERSTEIN: Okay. So if we're not going
12 to argue about that, let me say I believe your question goes
13 to that particular interrogatory. It's not one that the
14 manufacturers have asked, and it is one that the
15 distributors have asked, and we're not going to argue about
16 that one today. That's fine.

17 What I would like to say about the pharmacies though
18 is you heard an argument, and I know this is switching
19 gears, you heard an argument about why even if the
20 pharmacies are only sued as distributors the dispensing
21 information is necessary, because what counsel is arguing is
22 that you don't know that the shipment of a suspicious order
23 led to harm unless you have the dispensing information.

24 That's not the position the pharmacies take when we
25 ask for dispensing information, so when we've requested

1 information about their dispensing records the answer we get
2 is, well, you haven't sued us as a dispensary, so you can't
3 get the records. So either they're relevant they're or not,
4 the two issues are tied together or they're not. But what
5 we're hearing is they're tied together when they want it,
6 but they're not tied together when we want it.

7 I think separate and apart from that, the issues
8 raised by the pharmacy interrogatories are actually not
9 similar to the issues raised by the manufacturers. There's
10 an overall similarity in the sense that they're
11 individualized data, one dealing with prescriptions and the
12 other dealing with shipments, but when you drill into the
13 issue I think they're not similar, because the issues that
14 are overarching are theses contention interrogatories, when
15 is the appropriate time to answer them and who has the
16 records look very different.

17 The question about suspicious orders, which ones are
18 suspicious, suspicious prescribing, these are clearly expert
19 analysis questions. They're not questions that would be
20 done upfront at this point in discovery because any analysis
21 you would do of suspicious ordering is clearly an expert
22 question. So those interrogatories would call for expert
23 analysis, and to the extent that that is part of our case,
24 and that's another big difference, to the extent that that
25 is a term we use and is part of our case, it may be an

1 analysis we need to do, but it's an analysis our experts are
2 going to do. So the deadline for us to do that is when we
3 provide our expert report, not when we answer upfront early
4 interrogatories. So I think that is a key difference
5 between what's happening with the manufacturers and what's
6 happening with the prescribers.

7 The other difference is we need the discovery from
8 them to do it. They want us to say which prescriptions they
9 dispensed we say were diverted. They won't give us the
10 prescription information. So it's another reason besides
11 the issue of expert analysis, it's another reason that it's
12 a question that would be answered later in the discovery
13 process after we get the information.

14 SPECIAL MASTER COHEN: So that --

15 MS. BIERSTEIN: I think that's it, I'm going
16 to sit down.

17 SPECIAL MASTER COHEN: So you're saying then
18 that if you do get the information from the pharmacies that
19 you can answer the question.

20 MS. BIERSTEIN: I believe -- as to whether we
21 can answer -- it may be that there will be one or more of
22 the questions that say we are unable to answer at some
23 point, but it's premature for us to figure out whether we
24 can answer it or we would abandon some aspects of our claims
25 if we couldn't answer it. I think this is not the time to

1 know that until we have both the underlying information and
2 the expert analysis to tell us what we have.

3 SPECIAL MASTER COHEN: Before we go back to
4 defendants, Linda, I just want to ask you this question: If
5 we frame it just a little bit differently and we say
6 identify for us the prescriptions that represent an
7 oversupply, not the ones that are medically inappropriate,
8 which is their terminology, or unnecessary, which is their
9 terminology, but the ones that represent an oversupply, the
10 ones that shouldn't have been written because it's more than
11 should have been written, whether it's the script as a whole
12 or the number of pills, or however you want to define it,
13 how about that?

14 MS. SINGER: I think that is -- A, it's a
15 little difficult because that's not the question they've
16 asked, and I think they're trying to pursue a theory of
17 defense that is about turning this into lots of personal
18 injury cases, and proving each -- creating a trail of proof
19 that is marketing to script to patient to harm, right, to
20 payment by the city and county, which is again not our case.

21 That said, oversupply is going to be an expert
22 question. It's not going to be something that we could
23 answer on the basis of fact written discovery.

24 SPECIAL MASTER COHEN: Okay. Let me ask you,
25 I want to be cognizant of your time. When do people need to

1 leave to get flights, and so on? When does everybody want
2 to be sure this is over?

3 MR. CHEFFO: I can't speak for the plaintiffs,
4 I think we've all assumed that it would be two hours, so I
5 think we're going to try to keep it within that.

6 SPECIAL MASTER COHEN: 5:30 everybody wants to
7 be up, walking out.

8 MR. CHEFFO: I think we started at 3:40.

9 SPECIAL MASTER COHEN: I just want to make
10 sure nobody is missing planes.

11 MS. WINNER: 5:30 is what we were
12 anticipating.

13 MR. REED: Special Master Cohen, I've tried to
14 honor the time agreement. We're going over a bit, but I
15 would like to have a couple of minutes. I think this is a
16 very important issue.

17 MS. WINNER: And as would I, if possible.

18 SPECIAL MASTER COHEN: If your compatriots are
19 late it's your fault, I want to get it clear, it's not my
20 fault.

21 MR. REED: Understood, I'm willing to accept
22 that.

23 MS. WELCH: I will start briefly, and let
24 Steve and Mark chime in.

25 The choice by plaintiffs to proceed by way of

1 aggregate proof does not relieve them of their obligation to
2 participate in discovery. They can choose the way they
3 prove their case, they cannot deny us the discovery we need
4 to defend, and this is critical discovery that we need to
5 defend. It's critical discovery that we can't do ourselves.

6 I want to take Miss Singer's three points.

7 SPECIAL MASTER COHEN: Let's say you win
8 across the board, you get every ruling you could wish for.
9 Explain to me how you use it at trial.

10 MS. WELCH: Let me give you an example of 230
11 overdose deaths in Summit during a particular time period.
12 Theoretically they are asking us to pay for the harm
13 associated with a national crisis. They're asking us to pay
14 for the harm associated potentially with every single
15 overdose death.

16 We should be entitled at trial to say of 230 overdose
17 deaths, one, or perhaps zero, were of a person who took a
18 prescription for one of my client's products or one of the
19 other defendants' products. That one or zero were
20 prescribed an opioid inappropriately.

21 And they want to talk about medically unnecessary
22 being our term. It's not our term. The term in their
23 complaint is necessary for legitimate medical uses. So we
24 need to understand which prescriptions they claim were not
25 necessary for legitimate medical uses in a framework where

1 our clients marketed and sold lawful drugs that were FDA
2 approved. And if a doctor wrote a prescription for someone
3 and it was necessary for a legitimate medical use, we are
4 entitled to defend on that basis. And if a doctor wrote a
5 prescription for one of our clients' products and that
6 prescription didn't result in any harm, we're entitled to
7 defend on that basis.

8 SPECIAL MASTER COHEN: So why can't you say,
9 well, Court, jury, here are the 230 scripts that we wrote,
10 they were all legitimate.

11 MS. WELCH: The universe of prescriptions in
12 total for each of the defendants is a large number.

13 SPECIAL MASTER COHEN: It's equal for them to
14 identify them, or you?

15 MS. WELCH: It's not equal because we don't
16 know which ones they believe were not necessary for a
17 legitimate medical use. To allow us to start with the ones
18 that they claim resulted in harm or that they claim were not
19 necessary for legitimate medical use narrows the universe to
20 something that then we can begin to seek third-party
21 discovery on. But that is a relevant question, it's framed
22 by their pleadings, and it goes to the heart of our ability
23 to defend.

24 They talk about an overall taint and an overall
25 supply, but what we didn't hear them say is that they

1 believe every prescription for an opioid written in the
2 Track One jurisdictions during the relevant time period
3 shouldn't have been written or weren't for a legitimate
4 medical use, or that they did all result in harm.

5 And they are the ones in a position to know which ones
6 they think shouldn't have been written because they weren't
7 for a legitimate medical use, they are the ones in the
8 position to know which ones caused the harm, because we
9 don't even know what harm they are seeking reimbursement for
10 or seeking damages for right now.

11 They need to identify that universe so that we can do
12 the third party and other discovery to come to trial and
13 say, of those 5,000 they've identified, here's the answer.
14 Number one out of 5,000 was Mr. Jones. Mr. Jones had X
15 condition. Mr. Jones' doctor will testify that the
16 prescription was necessary. If Mr. Jones died, it was for
17 X, Y, or Z other reasons; or perhaps Mr. Jones is living a
18 productive life, and the prescription did not result in any
19 harm to the communities here.

20 SPECIAL MASTER COHEN: What about the problem
21 of -- well, let's just put it this way: What about Life
22 Care, how do you deal with Life Care where the Court says I
23 don't have the time -- I can imagine the Judge saying this,
24 I can imagine a judge I know pretty well saying this -- we
25 don't have the time to allow you to go through 5,000

1 prescriptions one by one and prove they're all legitimate,
2 and in Life Care the Court said we're not coming at it that
3 way, we're just not coming at it that way.

4 MS. WELCH: Ultimately how we put on the
5 defenses is a question for another day. This is a discovery
6 question about what relevant information we're entitled to
7 to determine what defenses we put on and how, and to show
8 why the aggregate proof model that Miss Singer and the
9 plaintiffs want to use doesn't work and why it's
10 inappropriate.

11 SPECIAL MASTER COHEN: I don't think you'd
12 prove that an aggregate model doesn't work and is
13 inappropriate by going through -- maybe I'm wrong, I'm not
14 committing to this position -- but it seems like you prove
15 the methodology is wrong perhaps or that the assumptions and
16 inferences are wrong, but not by going through one bit by
17 one bit by one bit, and all thousand million data points are
18 wrong.

19 MS. WELCH: We need to be able to challenge
20 the inputs, and if an expert is using an aggregate proof
21 model that suggests every prescription opioid on the work
22 we've done, were necessary for a legitimate medical use, but
23 we can't get to that level of proof without individualized
24 discovery.

25 SPECIAL MASTER COHEN: Okay.

1 MS. SINGER: Can I clarify a factual question?
2 I know that they have time, but since Miss Welch raised the
3 death reports, I think that's a perfect example of the kind
4 of information that has been produced.

5 So 230 overdose deaths, whatever the number is in
6 Summit County, it's too many, but so we have produced data
7 and documents from the Medical Examiner's Office that
8 includes the name of the individual, their medical records,
9 as I know you know well; the type of drugs they were taking,
10 including the prescription number, the doctor who prescribed
11 it; the cause of death, the toxicology reports.

12 You know, if you look at this data, the medical
13 examiner file has a drug list that includes the prescriber
14 name, the drug, name, the amount of strength, the
15 quantity --

16 MR. REED: Your Honor, at some point -- Miss
17 Singer has had her opportunity.

18 SPECIAL MASTER COHEN: Go ahead, Steve.

19 MR. REED: I'll be very brief. I think Miss
20 Welch covered this.

21 I will start by stating the obvious. We are here on a
22 discovery motion. I have not heard the plaintiffs say that
23 this evidence that we have asked for -- that this discovery
24 that we've asked for is irrelevant, they simply could not.
25 These are relevant facts that we're entitled to ask. We

1 think they're relevant to their claims; these facts are
2 plainly relevant to our defenses. That should be the end of
3 the discussion on relevance.

4 Proportionality, I think, Special Master, your
5 questions suggest that you get the point. We think this is
6 clearly proportionate.

7 In terms of whether they should be required to put in
8 the effort to create something, their interrogatory
9 requests, I think Miss Welch has already addressed that, but
10 this notion, if you look, step back, look at their
11 complaint, I think they studiously avoid using the phrase
12 medically unnecessary or medically inappropriate, but their
13 entire case is founded on this notion that these FDA drugs
14 were prescribed in inappropriate ways because of something
15 each of our clients did.

16 And setting aside the question whether these
17 fraud-based claims should have been pled with particularity,
18 that's a different issue. I'm past that for now. I'm
19 entitled to ask for the facts. I'm entitled to ask them
20 what they contend my client said or did that caused them
21 harm. Each of their claims requires causation as an
22 element. It is clearly relevant to this case.

23 And they do use the phrase, and I'll point you to each
24 of the Track One complaints, paragraphs 9 and 14; 14, in
25 each of the three complaints, is where they talk about

1 prescriptions that were not necessary for legitimate medical
2 uses.

3 We've heard today that the plaintiffs don't know what
4 "necessary" means. If that's true then they shouldn't have
5 alleged it in their complaint. I don't believe it's true,
6 and the only way that we're going to focus this massive case
7 on the facts -- on the disputes at issue is if they tell us
8 what they think is in contention, what is at issue, and then
9 we have a chance to attack it.

10 We can't tell them what they think is necessary or
11 unnecessary. They're the plaintiffs with the burden. We
12 need to know what the basis of their claims is so that we
13 can actually join issue at trial if we get that far.

14 SPECIAL MASTER COHEN: And what if their
15 response is we simply cannot answer that question and do not
16 know?

17 MR. REED: Special Master, I think the issue
18 for you is whether they should be ordered to do it. What
19 they do once they're ordered to we can deal with on another
20 day if we have to.

21 MR. CHEFFO: I have three quick points,
22 Special Master Cohen. The first is this idea that -- the
23 idea that it is not on somebody's word processor or list,
24 there is a lot of interrogatories responses, I can assure
25 you, all the defendants have answered that didn't just pop

1 up on some list; and they didn't exist before, yet we have
2 had to do it. So it is not a document request where -- if
3 it exists, we are not making them create new documents. But
4 their interrogatories, just like 30(b)(6)s, that's what you
5 do. Lawyers go out, they do the work, and they find the
6 information.

7 The second is we spent a lot of time, and I think my
8 colleagues have done -- I really have nothing more to add on
9 this issue of necessary for legitimate medical use. As you
10 can see, if you were to write an order and characterize it
11 exactly the way it's in the complaint, we certainly wouldn't
12 quibble with that.

13 But I think the other point I would just raise, and
14 you highlighted this earlier on, that's one of the three
15 prongs, right, just this kind of medical necessity or
16 legitimate medical use. The other is remember they're
17 saying basically anybody who was addicted or anyone who
18 overdosed or died, right? So those would be something,
19 that's the reason why we need these records.

20 And there's always some irony, because Miss Singer,
21 who I don't think answered one of your questions, got up and
22 said, well, look, there's only 210 of these deaths, or 250;
23 so our answer should be then it should be easy, because if
24 you were to look at the document, and I know that because I
25 took the deposition, the vast majority will say, I think

1 there's five or six oxycodone or hydrocodone when you look
2 at the tox reports. All right? So if you were to look at
3 the cause of death you would not find -- you'd find heroin,
4 methadone, cocaine.

5 So of the 210 deaths, I think it was, in 2015 in
6 Summit County, for example, it's exactly the point you've
7 been raising. What are we supposed to do with that? What
8 are we supposed to do with that? We say, okay, we now know
9 ten people have oxycodone in their system, or hydrocodone,
10 when they died. Okay?

11 But this idea that somehow mysteriously they're going
12 to bubble up and we're going to understand their theories,
13 what we're really coming down to is, again, this is
14 discovery. We did not frame the complaint. Our discovery
15 is only as broad as the breadth of their claims. They are
16 basically saying this huge panoply of people sustained harm
17 and damage, and we want compensation for that.

18 And all we're asking, as in any case, is okay, tell us
19 which ones, so we can then do our homework in the limited
20 time that we have, as opposed to what they continue to say
21 is trust us, some percentage of people, not all; we don't
22 really know, we don't want to tell you right now, but not
23 all. At some point we're going to tell you 60 percent, 70
24 percent.

25 And then what are we supposed to do with that? Are we

1 then supposed to reopen discovery, move the trial date,
2 because when we get an expert report in six months from now?
3 Now is the time to basically say, you've made these
4 allegations, you said omissions, misrepresentations, fraud
5 led to people doing things that caused us harm. And if this
6 was a plain vanilla any other case you would say, yeah, you
7 have to basically tell them so they can do the discovery to
8 find out if in fact that happened.

9 MS. WINNER: May I speak very briefly?

10 SPECIAL MASTER COHEN: Sonya, I know you have
11 been waiting patiently, kind of patiently.

12 MS. WINNER: I won't take very much of your
13 time. And I'm speaking for the distributors here, and we
14 have joined in this motion.

15 And I would echo what Mr. Delinsky said earlier about
16 how this discovery is also very important to the
17 distributors and to the pharmacies even though the claims
18 against us are different. And the reason for this is that
19 the claims against the distributors rest on an extremely
20 attenuated chain of causation.

21 And I think it's important, again, not to confuse, as
22 Miss Singer said, how the harm was created, what their
23 theory of the case was, as opposed to how they intend to
24 prove their case.

25 In terms of their theory of the case, as I understand

1 it, their theory is that there were inappropriate, excess,
2 however you want to put it, prescriptions that were written
3 by doctors who were influenced by the manufacturers. Those
4 prescriptions were then improperly filled by pharmacies who
5 shouldn't have filled them. The pharmacies in turn obtained
6 the medications that they used to fill those prescriptions
7 through what the distributor should have recognized as
8 suspicious orders; that some of the patients who filled
9 those prescriptions at those pharmacies became addicted to
10 the medications; that those people then did things that
11 caused the plaintiffs to spend money on emergency services,
12 treatment, and other things that they claim as damages and
13 harm here.

14 This entire edifice is built on there being bad
15 prescriptions out there. And whatever phrase you use to
16 describe the bad prescriptions, we're entitled to know what
17 those bad prescriptions are, because without that
18 information we can't trace whether anything we did several
19 links down the chain has anything to do with the damages
20 that are alleged here.

21 SPECIAL MASTER COHEN: Well, that's not quite
22 true, because without knowing precisely which prescriptions
23 were not medically necessary, at some point the inference
24 becomes so strong that a prescription was not legitimate
25 that a fact-finder could conclude that the order was

1 suspicious. I mean, wouldn't you agree that -- I'm just
2 thinking theoretically -- if a given pharmacy is blowing out
3 a million pills a day, okay, then you kind of have to
4 suspect maybe this isn't legit.

5 MS. WINNER: Well, it could be, it could be
6 that it is not. Probably not a million pills a day.

7 SPECIAL MASTER COHEN: Purposely I'm being
8 ridiculous.

9 MS. WINNER: A very large number. It could be
10 that is a pharmacy supplying a large hospice, for example.
11 It could be a pharmacy that for a variety of reasons
12 actually has very good reason to send out large volumes.

13 SPECIAL MASTER COHEN: I purposely chose a
14 ridiculous number just to make a point, that you don't need
15 to know for sure every script, you can infer it.

16 MS. WINNER: If the claims against us are
17 limited to orders that are pharmacies putting out a million
18 pills a day, you know, I think this case would get pretty
19 short though. So that's really not what the claims come
20 down to. It's much subtler than that, and so we need to be
21 able to know whether what is being called a suspicious order
22 actually did end up in the hands of people who shouldn't
23 have gotten the pills, shouldn't have been given the pills;
24 then went out and did something wrong that caused harm to
25 these plaintiffs.

1 SPECIAL MASTER COHEN: Okay. I think we spent
2 enough time on this, and I don't have any more questions,
3 and we have roughly 20 minutes more.

4 What else should we talk about?

5 MR. CHEFFO: I think, and we could do this
6 very quickly, I think we covered many of the things. I
7 think we would like to since we're here talk about the
8 30(b)(6) topics; again, unless you have anything on the
9 other one. And I think we could skip over some of them that
10 may have been covered. And I would be happy to try to do my
11 portion in 6 or 7 minutes, give my colleagues 3 or so
12 minutes, and give the plaintiffs 10, and we could finish at
13 around 5:30, if that works for you.

14 SPECIAL MASTER COHEN: Well, just so that
15 we're on the same page, Mark, I'm looking at the July 18th
16 letter from you, and starting on page 5 it lists specific
17 topics, and the first one is topic 3.

18 MR. CHEFFO: That's correct. I can give you a
19 quick little score sheet that might make it easier for you.
20 There are 13 topics --

21 MS. CONROY: I hope there are Bates numbers on
22 them.

23 MR. CHEFFO: No, I meant verbally; and I don't
24 hand things up during the middle of hearings.

25 MS. BIERSTEIN: If he writes it down we'll

1 object.

2 MR. CHEFFO: That's funny.

3 There are 13 topics, I believe, that the plaintiffs
4 have indicated they have refused to put up a witness, and
5 they are 4, 5, and 6 -- these are a little bit out of
6 order -- 19, 29, 3, 13, 7 and 8, 9, and 34, 14, and 30.

7 So what we've done, David, you know, I won't kind of
8 cover too much old ground, but you had -- just to remind
9 you -- as to Purdue, I'll use that for example, you had
10 overruled our objections as to 39 of these 30(b)(6) topics.
11 The plaintiffs have essentially said they want to reduce us
12 to 20, so there's 13. I will tell you, of the 6 -- because
13 we do listen and we did try to work with the plaintiffs; and
14 sometimes we work things out, and that's great, sometimes we
15 don't -- as to 6 of the 13 we basically said, for example,
16 we will take a written response.

17 Like so for example, on the 30(b)(6)s 4, 5, and 6,
18 which broadly deal with the issues we've been talking about
19 so we don't need a 30(b)(6) on all of the prescriptions --
20 in other words, someone to talk about those -- what we've
21 said is we would then to the extent that we have follow-up
22 questions, we would talk about the process. Right? So if
23 you give us the list, then we would talk about those process
24 issues. So that's 4, 5, and 6.

25 I think we've done the same for what I'll call this

1 hybrid approach, and that's identifying individuals who
2 became overdosed or addicted to opioids to the extent that
3 there was a written document about that. We would of course
4 then ask for the process, how you know, how you came to
5 that, so that we could understand.

6 And as we've talked about I think at some length,
7 Summit County, for example, does do this, we know it. We
8 haven't gotten through it. We've highlighted Summit County
9 because, frankly, that's the only one we have taken the
10 deposition of. I fully expect there will be a similar
11 process for others, but we'll find that out when we take
12 additional depositions; but they have this type of
13 information.

14 So that's 19 is the "Identify individuals who
15 overdosed or became addicted to opioids." Again, the issue
16 here is there's probably -- and you know, you pick up the
17 paper, and obviously it talks about opioids, no one is
18 disputing that, but to the extent, as you said for example,
19 someone unfortunately took carfentanil or fentanyl,
20 overdosed, never had an opioid prescription, nothing to do
21 with it, that's going to wind up in the overdose statistics.
22 We want to understand which ones are they carving out and
23 then find out how they did that.

24 SPECIAL MASTER COHEN: Let me interrupt you.

25 MR. CHEFFO: Sure.

1 SPECIAL MASTER COHEN: You rattled off the
2 numbers pretty quickly. I'm just going back to your letter.

3 MR. CHEFFO: Yes.

4 SPECIAL MASTER COHEN: Many of these overlap
5 with the topics we have already spent an hour and a half
6 chatting about, but some of them are different, some of them
7 don't.

8 MR. CHEFFO: Correct.

9 SPECIAL MASTER COHEN: It's those I want to
10 focus on. For example, topic 3.

11 MR. CHEFFO: Okay. That's marketing,
12 promotional issues.

13 SPECIAL MASTER COHEN: Right. So the way it's
14 I assume paraphrased, maybe not, in the letter is "Any
15 promotion, marketing, or educational activities concerning
16 prescription opioids in or concerning plaintiffs' geographic
17 area." This seems to be asking them to tell you what you
18 did.

19 MR. CHEFFO: Correct. And so let me just --
20 so the answer is -- and again, to the point of you have
21 given us guidance previously, right, don't ask things that
22 are too overly broad, what we basically did -- and I don't
23 frankly know if you have it in your letter, but certainly I
24 can tell you -- what we basically did, they objected on
25 overbreadth grounds, and we agreed to limit the testimony to

1 place the plaintiffs' knowledge of and efforts relating to
2 the concerns or complaints regarding the marketing or
3 prescription of opioids in the community. So in other
4 words, as opposed to them saying that the question is, you
5 know, you're asking us to tell us what you did, that's too
6 broad. Right?

7 We said, okay. What we're really asking for and what
8 our intention was, and we'll clarify, is what we're asking
9 for is you to tell us the information that you're aware of.
10 So for example, if they received complaints from doctors,
11 you know, that goes to statute of limitations issues, it
12 goes from others, it goes to their efforts.

13 SPECIAL MASTER COHEN: Complaints from
14 doctors, I mean, I'm not saying that as narrowed it's not
15 inappropriate now.

16 MR. CHEFFO: Yes.

17 SPECIAL MASTER COHEN: Complaints from doctors
18 isn't promotion, marketing, or educational activities. It
19 sounds like what you're asking for under topic 3 is of all
20 of those promotional, marketing, educational activities in
21 which we engaged, tell us about the ones you knew of.

22 MR. CHEFFO: Well, not -- yes, to the extent
23 that they were tracking it. I mean, again, if the answer is
24 they weren't and they don't know, it should be an easy
25 answer.

1 What we are trying to understand is tell us, in at
2 least this question, tell us the promotional activities that
3 you had information about. Right? So again, if someone is
4 claiming we didn't know you were doing X, Y, and Z, we are
5 entitled to understand, again, because you've just heard one
6 of their claims seems to be that there's this ubiquitous
7 kind of marketing machine of all the defendants together,
8 and we've basically asked them to the extent that they were
9 tracking our information about that, because again there are
10 other manufacturers and folks who would market and perhaps
11 distribute, that we think we're entitled to that
12 information.

13 I mean, again, in the grand scheme, David, these are
14 relatively discrete, I think narrow. Theirs are similar.
15 But we're trying to build obviously a defense on various
16 things. This should be presumably very easy. If someone
17 tracked this information then they should have someone who
18 can tell us about that. If they didn't, then they'll tell
19 us that, as well.

20 SPECIAL MASTER COHEN: Topics 24, 25, and 26
21 concern communications from plaintiffs and various parties,
22 entities, and members of plaintiffs' communities. Talk to
23 me about that.

24 MR. CHEFFO: Sure.

25 SPECIAL MASTER COHEN: It is on page 8 of your

1 letter.

2 MS. WINNER: That's not at issue.

3 MR. CHEFFO: Those aren't at issue, David.

4 Do you want me to read them again slowly?

5 SPECIAL MASTER COHEN: If they're not at
6 issue --

7 MR. CHEFFO: Those are not at issue.

8 MS. WINNER: Perhaps it could be helpful if
9 you refer to -- the letter dated August 31 has a summary
10 chart attached to it, and the plaintiffs submitted their own
11 chart dated September 4th, and that will list the specific
12 topics that are at issue at this point.

13 SPECIAL MASTER COHEN: And I don't have that
14 quickly available.

15 MS. WINNER: I have a clean copy which I'll be
16 glad to show to the plaintiffs, if they're willing to let me
17 give it to you.

18 SPECIAL MASTER COHEN: Well, this is a letter
19 I already received, correct?

20 MS. WINNER: Yes.

21 MR. CHEFFO: What date is this? This is a
22 plaintiffs document, this is yours. This is the plaintiffs'
23 letter.

24 SPECIAL MASTER COHEN: Thank you. I'm sorry.

25 MR. CHEFFO: That's okay, there's a lot of

1 paper floating around.

2 SPECIAL MASTER COHEN: Yes, I looked at this
3 this morning and didn't bring it.

4 MR. CHEFFO: Like I said, lots of paper. But
5 there are 13 topics that are still -- you know, the good
6 news is I don't recall exactly how they got resolved, but
7 probably through a meet and confer, which is good.

8 SPECIAL MASTER COHEN: Yes, it is. And topic
9 30, plaintiffs' knowledge of the DEA setting quotas, again,
10 explain to me what you're really after here.

11 MR. CHEFFO: I'm happy to try to. This is one
12 I was probably going to punt to my colleagues, the
13 distributors.

14 SPECIAL MASTER COHEN: Anybody on the left
15 side?

16 MS. WINNER: Okay. We were going to punt to
17 our papers on this one, frankly.

18 MR. CHEFFO: I can address it if you want.

19 MS. WINNER: We can address it. As you know,
20 the DEA, I'm sure you know the DEA sets quotas for
21 prescription opioids, and we want to know, we agreed to
22 limit this topic to testimony about information about their
23 discussion or their evaluation of any involvement with
24 actions relating to the DEA's actions.

25 In other words, did they try to get involved with the

1 DEA, saying you're allowing too much? Did they evaluate
2 internally whether they should have talked to the DEA about
3 it, that sort of thing. I wouldn't think -- this would
4 probably be a very short topic.

5 SPECIAL MASTER COHEN: It is conceivable that
6 their answer, that the deponent's answer would be we have no
7 knowledge of any quotas that the DEA set, right?

8 MS. WINNER: That's entirely possible, which
9 would make it a very short topic.

10 MR. CHEFFO: Or a writing to that effect. I
11 mean, if that was, you know --

12 SPECIAL MASTER COHEN: And so causes of,
13 quote, the opioid crisis?

14 MR. CHEFFO: That is 9 and 34, that's what I
15 have. I think, David, generally the factors other than the
16 conduct of any defendant that you believe affected
17 prescribing. So again, you know --

18 SPECIAL MASTER COHEN: China and the Internet.

19 MR. CHEFFO: Right. Again, if the plaintiffs
20 want to stipulate that they were aware of that, that they
21 know that, that they've known it for 20 years. These are
22 issues that I can tell you why --

23 MS. WINNER: I think we're entitled though to
24 some deposition testimony about what knowledge they have
25 about other causes of the crisis.

1 MR. CHEFFO: Yeah. I wasn't saying that we're
2 going to take just a running, but I'm saying these are
3 factors that are within very important areas, including
4 statute of limitations, alternate causation, you know.

5 To the extent that there are factors here and to the
6 extent they're going to have a model, you asked about that
7 earlier, you know, to find out and to be able to depose
8 whoever it is they're going to proffer for that as to
9 whether they have accounted for these various issues. So
10 there's multiple ways, both in our defenses, but also a lot
11 of this information is going to be needed, you know,
12 ultimately for our experts, and frankly in discovery and
13 depositions of their experts. And these are not
14 particularly broad topics.

15 SPECIAL MASTER COHEN: Do plaintiffs want to
16 address the topics that I just listed?

17 MS. SINGER: That would be David Ackerman and
18 Sal Badala.

19 SPECIAL MASTER COHEN: Ah-hah. Let me see if
20 I can figure out how to press the button on the phone.

21 I'm going to un-mute you, and hopefully Sal and David
22 will be able to respond.

23 Are you guys there?

24 MR. ACKERMAN: This is David Ackerman, I am
25 here. Sal, are you there as well?

1 MR. BADALA: Hi, Special Master Cohen, this is
2 Sal Badala.

3 SPECIAL MASTER COHEN: Greetings. Welcome
4 into the courtroom.

5 MR. ACKERMAN: Thank you.

6 SPECIAL MASTER COHEN: So whoever wants to hit
7 that tennis ball back over the net.

8 MR. BADALA: That's fine. Special Master
9 Cohen, I will first address topic 3. Plaintiffs did offer a
10 written response to this topic, defendants refused to accept
11 a written response. We think it would be more appropriate
12 for them to accept a written response at least on this
13 topic.

14 To produce a witness would be overly burdensome in the
15 sense that a witness would have to go through the entire
16 defendants' production just to prepare for this 30(b)(6), so
17 we think a written response would be better.

18 As for topic 30, we're kind of confused there's even
19 an issue here. It was the defendants that proposed limiting
20 this topic to what efforts, if any, plaintiffs may have made
21 to --

22 COMPUTERIZED VOICE ON PHONE: -- has left the
23 conference.

24 MR. BADALA: -- the quota setting process, and
25 the defendants put it in their July 18th letter, and then

1 they went back and expanded even further their topic. So we
2 think that to the extent that we have to put up a witness on
3 this subject that it be restricted to what they had actually
4 proposed in their July 18 letter, not to the expanded
5 version that they now offer.

6 And I believe going back, now I believe the next topic
7 you referred to was topic 9. We actually offered a written
8 response, and I just want to get some context about written
9 responses. We had offered written responses for eight
10 topics. The defendants haven't accepted all of those, but
11 just in context of the litigation, for plaintiffs 30(b)(6)s
12 served on defendants, some of the defendants have ranged up
13 to 13 to 26 topics that they're providing written responses
14 on. So you can see that it's not equal in the sense that
15 we're being forced to put up more witnesses on these topics
16 where defendants are actually providing written responses
17 for up to 26 topics.

18 And I'm sorry, I believe the next one was topic 34.

19 MR. ACKERMAN: Can I jump in real quick on 9?

20 There's an issue, Special Master, with number 9, that
21 it's just not described with particularity. The factors
22 other than the conduct of any defendant, I don't know how to
23 prepare a witness for that. If there are specific factors
24 that they want to talk about, they could describe --

25 COMPUTERIZED VOICE ON PHONE: -- has left the

1 conference.

2 MR. ACKERMAN: But to just say the word
3 "factors" is too vague for Summit County or Cuyahoga or
4 Cleveland or Akron to effectively educate a witness to
5 testify.

6 SPECIAL MASTER COHEN: Okay. And what was the
7 next one? 34?

8 MR. BADALA: Yes. David, I don't know if you
9 wanted to go, but I think 34 is the same issue.

10 MR. ACKERMAN: I think 34 and 9, that's almost
11 the same topic, right? Nine is the factors other than the
12 conduct of the defendant, and 34 is causes of the opioid
13 crisis, and then there's an italicized paragraph that says,
14 identification of any individuals other than defendants.

15 So they seem to me to be the same topic, and I think
16 the same arguments we've made with respect to 9 apply to 34.

17 MR. CHEFFO: I think 9 and 34 are actually
18 quite different. I know they're related to impact, but 9
19 talks about the factors, the conduct of the defendant that
20 you believe affected prescribing practices for prescription
21 opioids in your community. So that talks about factors
22 impacting doctors' prescriptions. It shouldn't be that
23 hard, these are the kind of claims they're talking about.
24 Are there any other claims that they think or any other
25 influences on doctors, that's one.

1 The other is the causes of the opioid crisis. And as
2 that term is defined, that's what it says in the second
3 amended complaint. So to the extent, for example, they have
4 information about trying to interdict postal deliveries from
5 China or Mexico, or whether it's pill mills, or whether
6 doctors are engaging in illegal conduct, or any host of
7 issues that one would think have been considered by these
8 sophisticated municipalities, those are the types of things,
9 because again their complaint doesn't say that, you know,
10 there's these 50 other constituent causation and then
11 there's these two or three groups.

12 They're basically saying the opioid crisis was caused
13 by the defendants in this case, and it's certainly, I think,
14 a legitimate cause of inquiry to say, okay, are you aware of
15 other causes.

16 And then the same thing, their claim appears to be
17 many of these doctors prescribed based apparently on some
18 type of detail or messaging or omission, and to the extent
19 that they have information then I think we will find in
20 these depositions that there are other causes of these.
21 Those are legitimate areas of inquiry.

22 The last thing I will say on this is that this has to
23 be balanced. We're not looking in the context of what you
24 have seen, the incredible breadth of the types of
25 information; you know, tell us every process that went into

1 marketing messages, and people that you funded or lobbying
2 activities. So there is an element of these are important
3 issues to us, and I don't think that -- if the answer is
4 they don't have it, they don't know, then they could just
5 basically tell us that and give a sworn statement on that,
6 and then we'll kind of move on.

7 MR. BADALA: Special Master Cohen, if I may
8 respond to that just quickly.

9 I think that Mr. Cheffo's argument demonstrates the
10 problem with the topic. There are clearly some sort of
11 underlying causes that defendants want to focus on, but
12 they're not going to tell us. They're going to play hide
13 the ball, and somehow we have to educate a witness on, you
14 know, guess the topic, and if somebody shows up in a
15 deposition and starts asking questions about some unknown
16 thing that the defendants claim caused the opioid crisis and
17 our witness says, well, I don't really know anything about,
18 you know, migration from this particular pill mill in
19 Oklahoma or something, then we're going to get a letter that
20 says, oh, your witness wasn't fully informed to testify on
21 this, and you have to bring them back.

22 This is exactly the problem and why the topic isn't
23 described with particularity to allow us to functionally
24 educate a witness to testify as to the knowledge of the
25 governmental entities.

1 SPECIAL MASTER COHEN: If the deponent says
2 "We don't know that question, we don't know the answer to
3 that question, we don't know what other causes of the opioid
4 crisis is, we don't know," that's a sufficient answer. You
5 don't have to prepare them to know anything they don't
6 already know.

7 MR. CHEFFO: Exactly. That would be our
8 position. Their obligation is to poll the people who would
9 literally know and ask them. My guess is we're not going to
10 find no one in Cleveland who is going to say we have no
11 idea. Someone will likely say here is the various causes,
12 they will be questioned about those, and if they're asked
13 are you aware that this is a cause, or do you believe it, if
14 their answer is no or I don't know, it's next question.

15 MR. REED: Could I jump in for a second? If
16 you look at the topic, it says "The factors other than the
17 conduct of any defendant that you believe affected
18 prescribing practices." That's 9, right? So on that,
19 they're not going to be sandbagged because we're asking what
20 they believe. They can't be surprised by that. By
21 definition, we're asking about what they believe.

22 SPECIAL MASTER COHEN: But they could believe
23 it is because the moon is made of green cheese, so I'm not
24 sure I like that either.

25 MR. CHEFFO: You know, these are corporate

1 type reps, so this would have to be the position of
2 Cleveland or Cuyahoga, and presumably Cleveland doesn't
3 believe that it's caused by something, you know, kind of
4 outrageous or impractical.

5 SPECIAL MASTER COHEN: Well, I get it.

6 MR. BADALA: And if I -- just one more very
7 brief point on this. You know, as Mr. Cheffo said, it's a
8 representative of the governmental entity, and this is not
9 an issue where it's lobbying, and where you can go to the
10 lobbying department of the defendant and figure out who
11 knows everything about lobbying. This is a question of
12 causes of the opioid crisis. In order to provide testimony
13 regarding that on behalf of Summit County, you have to go to
14 virtually every single agency or employee of Summit County.

15 MR. CHEFFO: That's just not true. There's
16 reports that are on the Internet about the opioid crisis,
17 about deaths, about overdoses. If you ask the medical
18 examiner what she believes is the cause of death of many of
19 the people who overdose, she would say it's the fentanyl
20 problem. These are not questions that are unanswerable.

21 SPECIAL MASTER COHEN: Okay.

22 MR. BOEHM: If I may, at least --

23 COURT REPORTER: (Interrupted.)

24 MR. BOEHM: I was just making the point that
25 at least some of plaintiffs have set up task forces charged

1 with the very purpose of trying to determine what the causes
2 of the opioid crisis is. This is truly not an issue that
3 should be a challenging one, at least in those instances.

4 SPECIAL MASTER COHEN: All right, folks. It's
5 a little bit after 5:30, and as I said, I am determined not
6 to make anybody late to a plane.

7 So thank you all for your input. There are a lot of
8 issues here, I will get to them as soon as I can. I am not
9 going to issue anything from the bench, and I will think
10 very hard about everything you've given me.

11 Thank you all very much.

12 - - - - -

13

14 C E R T I F I C A T E

15

16 I certify that the foregoing is a correct transcript
17 from the record of proceedings in the above-entitled matter.

18

19 s/Heidi Blueskye Geizer October 1, 2018

20 Heidi Blueskye Geizer Date
21 Official Court Reporter

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